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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

Haiqi CHEN

Plaintiff,

v.

United States Citizenship and Immigration Services  
("USCIS"); Department of Homeland Security  
("DHS"); Department of Justice ("DOJ"); Federal  
Bureau of Investigation ("FBI")

Defendants.

Case No. C 07-2462 SC

**[PROPOSED] ORDER  
DENYING DEFENDANTS'  
MOTION TO DISMISS**

1 Defendants' motion to dismiss came on for hearing before this Court on November 16,  
2 2007. Plaintiff Haiqi CHEN ("Plaintiff") filed a petition for writ of mandamus based on  
3 Defendants' delay in adjudicating his employment-based Application to Adjust Status (Form I-  
4 485) ("AOS application"), which has been pending for over four years, since July 3, 2003. It is  
5 undisputed that Plaintiff's AOS application has not yet been adjudicated because the Federal  
6 Bureau of Investigation ("FBI") name check in his case is still pending.  
7

8 Defendants first argue that the FBI should be dismissed as a party from this action  
9 because it is not a proper defendant. This Court rejects Defendants' argument, and finds that the  
10 FBI is a proper defendant because it has a mandatory duty to adjudicate name check requests  
11 made by Defendant United States Citizenship and Immigration Services ("USCIS") and, pursuant  
12 to the Administrative Procedures Act ("APA"), must complete those requests within a  
13 "reasonable time." 5 U.S.C. § 555(b).  
14

15 Defendants also argue that this Court lacks jurisdiction under the APA and the Mandamus  
16 Statute (28 U.S.C. § 1361) over Plaintiff's claims. This argument runs counter to every court in  
17 this district that has considered the issue, including this Court. Mandamus is an extraordinary  
18 remedy and is available to compel a federal official to perform a duty only if: (1) the individual's  
19 claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly  
20 prescribed as to be free from doubt, and (3) no other adequate remedy is available. Patel v. Reno,  
21 134 F.3d 929, 931 (9th Cir. 1997); Azurin v. Von Raab, 803 F.2d 993, 995 (9th Cir.1986). This  
22 Court finds that both the Immigration and Nationality Act, and its implementing regulations,  
23 create a mandatory and non-discretionary duty that Defendants must adjudicate pending AOS  
24 applications. See 8 U.S.C. § 1255(a); 8 C.F.R. § 245.2(a)(5). This Court further finds that the  
25 Administrative Procedures Act ("APA") requires that such applications be adjudicated within a  
26 "reasonable time." 5 U.S.C. § 555(b). This Court, therefore, has jurisdiction to consider whether  
27  
28

1 Defendants' over four year delay in adjudicating Plaintiff's AOS application is reasonable. See  
2 Soneji v. DHS, 2007 WL 3101660, at \* 5 (N.D. Cal. Oct. 22, 2007) (finding that this Court has  
3 jurisdiction to consider plaintiffs' mandamus action, which is based on their AOS applications  
4 that have been pending for three-and-a-half years).

5 Finally, Defendants argue that this Court is barred from reviewing Plaintiff's claims under  
6 8 U.S.C. § 1252(a)(2)(B). Again, this runs counter to this Court's prior holding, as well as to the  
7 holdings reached by other courts in this judicial district to consider this issue. See, e.g., id. at \*2-  
8 3; Dong v. Chertoff, -- F. Supp. 2d --, 2007 WL 2601107, at \*3-4 (N.D. Cal. Sept. 6, 2007).  
9 Pursuant to 8 U.S.C. § 1252(a)(2)(B), courts lack jurisdiction to review a "decision or action of  
10 the Attorney General or the Secretary of Homeland Security" where that decision or action "is  
11 specified under this subchapter to be in the discretion of the Attorney General or the Secretary of  
12 Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). Here, although Defendants have discretion as  
13 to whether to grant or deny AOS applications, they do not have the discretion not to adjudicate  
14 them at all. See 8 U.S.C. § 1255 (Immigration and Nationality Act provision governing AOS  
15 applications). Thus, this Court has jurisdiction to determine whether the agency's delay in acting  
16 was reasonable under the APA.  
17

18  
19 After considering Defendants' motion to dismiss, Plaintiff's opposition to that motion,  
20 arguments of counsel, and all other matters presented to this Court, it is **HEREBY ORDERED**  
21 **THAT Defendants' motion to dismiss be and hereby is DENIED.**  
22

23  
24 Dated:

\_\_\_\_\_  
United States District Judge  
Samuel Conti